88-645

Supreme Court, U.S.
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No. _____.

IN THE

Supreme Court of the United States

October Term, 1988

RON ALVERADO, GORDON C. ARLT, DAVID T. BUSHEY, EDWARD K. BURSLETT, LYNN HAMMIT, DONALD JARRETT, IRA C. MARTIN, WILL MATHEWS, MICHAEL B. PARR, ART SCHMIDT AND DAVID E. YORK,

Petitioners,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM AND BECHTEL CONSTRUCTION, INC., AND/OR BECHTEL POWER CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

I. Whether the Washington Supreme Court erred in holding that state constitutional protections for privacy stop at the door of a nuclear power plant because they are preempted by the Atomic Energy Act?

II. Whether the Washington Supreme Court erred in holding that the indiscriminate drug testing program instituted by WPPSS did not violate the Fourth Amendment?

LIST OF PARTIES

Petitioners are:

Ron Alverado
Gordon C. Arlt
David T. Bushey
Edward K. Burslet
Lynn Hammit
Donald Jarrett
Ira C. Martin
Will Mathews
Micheal B. Parr
Art Schmidt
David E. York

Respondents are:

Bechtel Construction, Inc., and/or Bechtel Power Corporation
Washington Public Power Supply System

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IN THE
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RON ALVERADO, GORDON C. ARLT, DAVID T. BUSHEY, EDWARD K. BURSLETT, LYNN HAMMIT, DONALD JARRETT, IRA C. MARTIN, WILL MATHEWS, MICHAEL B. PARR, ART SCHMIDT AND DAVID E. YORK,

Petitioners,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM AND BECHTEL CONSTRUCTION, INC., AND/OR BECHTEL POWER CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The Petitioners, Ron Alverado, et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington, which became the decision terminating review in the above entitled proceeding on July 15, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported at *Alverado et al. v. Washington Public Power Supply System*, 111 Wn.2d 424 (Wash. 1988), and is reprinted in Appendix B.

The order and judgment of the Superior Court of the State of Washington for the County of Benton denying the Petitioners' motion for a preliminary injunction, and its later order dismissing their suit, have not been reported. They are reprinted in Appendix A.

JURISDICTION

The Supreme Court of the State of Washington affirmed the dismissal of the Petitioners' complaint by the Superior Court in an opinion filed July 15, 1988. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

The statute involved here is the Atomic Energy Act, 42 U.S.C. § 2011 *et seq*. This is reproduced in relevant part in Appendix C. The constitutional provisions involved are the Fourth Amendment of the Constitution of the United States and Article 1, Section 7 of the Constitution of the State of Washington. These are reproduced in full in Appendix C.

STATEMENT OF THE CASE

The Petitioners are plumbers, pipefitters and welders who live and work in the Tri-Cities area, located in the southeastern part of the State of Washington. The Respondent, Bechtel Construction Inc. and/or Bechtel Power Corporation ("Bechtel"), is a contractor performing construction and maintenance work for the Respondent, Washington Public Power Supply System ("WPPSS"). WPPSS is an agency of the State of Washington which operates a number of electrical power generating plants throughout the state, including a commercial nuclear power plant on the Hanford nuclear reservation in the Tri-Cities area. The Petitioners have been hired in the past by Bechtel to perform construction and maintenance work at the WPPSS nuclear power plant and expect to be hired to perform such work in the future.

In August 1986, at the direction of WPPSS, Bechtel instituted a requirement that job applicants provide a urine sample for drug-testing to qualify for employment. Present employees, including reactor operators and guards, are exempt from indiscriminate drug-testing. New employees who will be working for less than 30 days and who are not assigned to security areas are also exempt. Any employee may be asked to take a drug test if Bechtel or WPPSS has cause to believe the employee is using drugs.

The stated reason for differentiating between current employees and job applicants is that drug abuse among current employees can be detected by observing their behavior.

Nonetheless, backed by its expert, WPPSS explains the need for drug-testing by stating:

> The effects of many drugs are so insidious as to render ineffective mere behavioral signs of intoxication in determining if the drug user's judgment, decision-making skills, short term memory and motor skills are impaired. In these circumstances, a drug test is the only effective way to determine the presence of drugs in the nuclear worker's system.

This suit was filed to stop Bechtel and WPPSS from requiring all job applicants to provide urine samples for drug-testing.[1] The suit was based solely on the Petitioners' state constitutional right of privacy under Article 1, Section 7 of the Constitution of the State of Washington. The Petitioners did not assert any claim under Bechtel's labor contracts or under federal law.

On the basis of a stipulated record, the trial court refused to enjoin the drug-testing program. The Petitioners filed for direct appeal to the Supreme Court of the State of Washington.

The Washington Supreme Court accepted review and ruled that the Petitioners' state constitutional claim was preempted by the Atomic Energy Act. The Washington Court reasoned that "the matter of safety at nuclear power facilities is a classic example of congressional intent to 'occupy the field' and preempt any state action." *Alverado,* 111 Wn.2d at 432; Appendix B at B-8. It concluded that the purpose of the WPPSS drug testing requirement was to further safety. Consequently, the Washington court held that the state constitution was preempted in this area and the drug testing program could only be challenged under the federal constitution. This

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1. The Petitioners do not challenge the requirement that employees submit to drug testing if Bechtel or WPPSS has cause to believe they are using drugs.

issue had not been raised on appeal and was never briefed to the Washington Supreme Court.[2]

The Washington Court then went on to find that the drug testing program did not violate the Fourth Amendment of the United States Constitution. The Washington court adopted the Third Circuit's application of the administrative search exception, normally applied to searches of business premises in highly regulated industries, to drug-testing of employees. *Alverado,* 111 Wn.2d 435-437. The Washington Court refused to follow the Ninth Circuit, the Circuit within which Washington is located, which has rejected the application of the administrative search exception to employee drug-testing. *Railway Labor Executives Assn. v. Burnley,* 839 F.2d 575 (9th Cir. 1988), *cert. granted,* 108 S. Ct. 2033 (1988).

The Petitioners ask the Court to review two independent issues in this petition for certiorari. They ask that the Court review the Washington court's holding that the state constitutional right to privacy of employees in nuclear power plants is preempted whenever safety concerns are raised. A decision in favor of Petitioners on this issue should result in a remand to the Washington court for a decision under the state constitution. They also ask that the Court review the Washington court's analysis of the Fourth Amendment. A decision in favor of Petitioners on this issue should result in a reversal of the Washington court's decision. Thus, there are two independent grounds for accepting review and reversing the decision of the Washington court.

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2. The issue was raised before the trial court. Based on *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission,* 461 U.S. 190 (1983), the trial court held that state constitutional privacy protections are not preempted by the Atomic Energy Act. Appendix A, p. A-3. 28 U.S.C. §2403(b) may be applicable, although no court has so certified, and a copy of this petition has been served on the Attorney General of the State of Washington.

REASONS FOR GRANTING THE WRIT

I. THE WASHINGTON COURT ERRED IN HOLDING THAT STATE CONSTITUTIONAL PROTECTIONS FOR PRIVACY STOP AT THE DOOR OF A NUCLEAR POWER PLANT BECAUSE SUCH PROTECTIONS ARE PREEMPTED BY THE ATOMIC ENERGY ACT

A. The Washington Court's Decision Conflicts With The Court's Preemption Analysis In *Pacific Gas and Electric Co.* And *Silkwood*, Where The Court Recognized The Continuing Authority Of The States To Regulate Activity Involving Nuclear Power Plants For Purposes Other Than Radiological Safety.

The extent to which states may regulate activities relating to nuclear power plants has been a source of litigation since the enactment of the Atomic Energy Act of 1954. In those cases where a state has attempted to impose safety regulations concerning the method of construction or the method of operation of a nuclear power plant more stringent than those required by the Nuclear Regulatory Commission ("NRC"), the Court has found the state regulations to be preempted by the Atomic Energy Act.[3]

State law does not, however, stop at the door of all nuclear power plants. As the Court firmly established in *Pacific Gas And Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), the states retain their traditional authority to regulate many of the activities related to the operation of nuclear power plants. The Court held that the federal government has exclusive authority over (461 U.S. at 205):

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3. *E.g. Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972) (State may not impose more stringent regulations on radioactive discharges from a nuclear power plant than those established by the Atomic Energy Commission).

> . . . the *radiological safety aspects* involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, *and other related state concerns*. (emphasis added)

In *Pacific Gas*, the Court went so far as to find that the state of California had the authority to halt construction of all nuclear power plants in the state until the NRC approved a method of permanent storage for nuclear waste. In making this determination, the Court focused on the purpose of the California statute, relying on language in the Atomic Energy Act preserving state and local authority "to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k). The Court reasoned that this language "underscored the distinction drawn in 1954 between the spheres of activity left respectively to the Federal Government and the States." *Pacific Gas*, 461 U.S. at 210. As the purpose of the California statute was to insure the economic viability of nuclear reactors built in the state, not to block their construction for safety reasons, the statute was not preempted.

The limits on exclusive federal jurisdiction over matters relating to nuclear power plants were further developed by the Court in *Silkwood v. Kerr-McGee Corp*, 464 U.S. 238 (1984) (state tort claim, including claim for punitive damages, not preempted by Atomic Energy Act) and *Goodyear Atomic Corp. v. Miller*, ____ U.S. ____, 100 L.Ed.2d 158, 172 n.9 (1988) (state workers' compensation act, providing for punitive award where accident caused by employer's failure to comply with state industrial safety regulations, not preempted by Atomic Energy Act). In both of those cases the Court recognized that state remedies were available to injured workers employed at nuclear power plants, despite the effect of such remedies on nuclear facilities.

In *Silkwood,* the Court specifically rejected the argument that recovery should be foreclosed because the federal government had "completely occupied the field of safety". Instead, in order to find a state remedy preempted, the Court required a showing of "an irreconcilable conflict between the federal and state standards or [the showing that] the imposition of a state standard in a damages action would frustrate the objectives of the federal law." *Silkwood,* 464 U.S. at 256.

Because of these cases, neither Bechtel, one of the largest construction companies in the world, nor WPPSS, raised any claim before the Washington Supreme Court that the Petitioners' state constitutional rights were preempted by the Atomic Energy Act.[4] Nonetheless, the Washington court *sua sponte* determined that the state constitutional privacy rights of employees stopped at the door of the WPPSS nuclear power plant because the state constitution was preempted by the Atomic Energy Act. The Washington court reasoned that the drug testing program was "instigated in an effort to promote safety" and "any state action pertinent to safety at a nuclear power facility was preempted". *Alverado,* 111 Wn.2d at 432-33; Appendix B, p. B-8-9.

This decision is contrary to the Court's direction in *Pacific Gas* that most state law does not stop at the door of a nuclear power plant and that the purpose of a state law must be examined to determine if it is an impermissible attempt to interfere with the federal government's regulation of nuclear safety. Article 1, Section 7 of the Washington state constitution provides for the protection of all individuals' right to privacy. No claim can be made that this constitutional protection has the purpose of regulating safety programs in nuclear power plants. Consequently, the state constitutional privacy protection must be evaluated, as are a state's tort laws, or its

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4. As noted above, *infra,* p. 4, n.2, the preemption issue was raised in and rejected by the trial court. Appendix A, p. A-3.

workers' compensation laws, to determine if there is an "irreconcilable conflict" with the federal regulations, or a frustration of "the objectives of the federal law". *Silkwood*, 464 U.S. at 256.

No such "irreconcilable conflict with the federal regulations is present here. There is no NRC regulation requiring licensees to institute indiscriminate drug testing of job applicants or employees. Such a regulation was proposed by the NRC in 1982[5], but was later withdrawn.[6] WPPSS described in detail how the drug testing program was developed in conformance with standards developed by industry groups and with input from employees. Harding Affidavit, Appendix D, p. D-4-5, ¶¶10-14. It cannot be denied that the drug testing program challenged here was mandated by WPPSS, not by NRC regulations.[7]

Contrary to *Pacific Gas*, the Washington court failed to look to the purpose of state constitutional privacy protections to make the threshold determination of whether or not the state law was an invalid attempt to interfere with the federal government's regulation of nuclear safety. Contrary to *Silkwood*, the Washington court failed to examine the state constitutional privacy protections to determine if there was an "irreconcilable conflict" between the state law and federal regulations. Had the Washington court applied these standards for evaluating preemption under the Atomic Energy Act, it would not have held the state constitutional privacy rights of all employees at nuclear power plants to be preempted. This error warrants review.

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5. 47 Fed.Reg. 33,980

6. 51 Fed.Reg. 27,872

7. The opinion of the Washington court leaves the impression that the NRC had adopted a regulation requiring drug testing of employees. The NRC did adopt a "policy statement" indicating that licensees should develop a fitness for duty program to prevent employees from coming to work under the influence of drugs or alcohol, but nothing in this policy statement mandated the indiscriminate drug testing of job applicants required by WPPSS and challenged here. 51 Fed. Reg. 27,872.

B. The Washington Court's Holding That State Constitutional Protections Do Not Apply to Employees At Nuclear Power Plants Where Such Laws Affect Safety Concerns Has Wide-Ranging Implications For The Tens Of Thousands Of Employees At Nuclear Power Plants Across The Country.

There are over a hundred nuclear power plants currently operating in the United States[8], each employing hundreds of employees, with hundreds more employed during their construction and repair and maintenance shutdowns. While the NRC regulates many of the conditions under which these employees work, particularly conditions relating to the safe handling of nuclear materials, many of these employees' working conditions are regulated only by the state. State laws directly affecting safety in the workplace include industrial safety regulations, workers' compensation statutes, and state statutes requiring employers to inform employees of hazardous materials with which they come in contact. In addition, a myriad of other state laws regulate the employer-employee relationship, including state constitutional and statutory protections against the use of lie detector tests, drug-testing, and other invasions of privacy, state minimum wage and overtime statutes, and state tort laws.

All such laws can arguably be related to safety concerns. The Washington court's decision broadly asserts that all matters related to safety at nuclear power plants are "governed by federal law alone". *Alverado*, 111 Wn.2d at 433, Appendix B, p. B-9. Thus, the decision of the Washington court here calls into question the validity of all such state laws as they apply to employees at nuclear power plants. This is an important issue, with wide-ranging effects on tens of thousands of employees, and should be reviewed by this Court.

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8. 145 *Nuclear Info*, U.S. Council for Energy Awareness, p.1-2 (Jan. 1988)

II. THE WASHINGTON COURT ERRED IN HOLDING THAT THE INDISCRIMINATE DRUG TESTING PROGRAM INSTITUTED BY WPPSS DID NOT VIOLATE THE FOURTH AMENDMENT. AS THIS IS AN IMPORTANT ISSUE ON WHICH THE CIRCUITS HAVE SPLIT AND OF WHICH THE SUPREME COURT HAS ACCEPTED REVIEW IN *BURNLEY* AND *NATIONAL TREASURY EMPLOYEES*, REVIEW SHOULD BE GRANTED PENDING THE COURT'S DECISION IN THOSE CASES.

The issue of whether indiscriminate or random drug testing of employees is permissible under the Fourth Amendment has been extensively litigated during the last several years. The Circuits, as well as the State courts, have split on this issue. The Ninth Circuit[9] and the Sixth Circuit[10], as well as the highest appellate court for the State of New York[11], have held

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9. *Railway Labor Executives Assn. v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *cert. granted*, 108 S. Ct. 2033 (1988) (Absent individualized suspicion, drug testing of railroad employees violates Fourth Amendment).

10. *Lovvorn v. Chattanooga*, 846 F.2d 1539 (6th Cir. 1988) (Random drug testing of firefighters not justified under Fourth Amendment); *Penny v. Kennedy*, 846 F.2d 1563 (6th Cir. 1988) (Random drug testing of police officers not justified under Fourth Amendment); *See also, Division 241 Amalgamated Transit Unit v. Suscy*, 538 F.2d 1264, 1267 (7th Cir 1976), *cert. denied*, 429 U.S. 1029 (1977) (Drug test of bus drivers allowed because "probable cause" that bus drivers were under the influence of drugs was required); *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935 (D.C.Cir 1987) (Balancing approach suggested in evaluating drug testing program; remanded to trial court).

11. *Patchoque-Medford Congress of Teachers v. Board of Education*, 517 N.Y.S.2d 456 (N.Y. Ct. App. 1987) (Drug testing of teachers absent reasonable suspicion of drug use violates Fourth Amendment); *See also, Fraternal Order of Police, Newark Lodge No. 12 v. Newark*, 524 A.2d 430 (N.J. Super. Ct. App. Div. 1987) (Individualized suspicion required for drug testing of police officers); *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. App. 1985) (Reasonable suspicion required for drug testing of police officers); *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1008 (D.C. 1985) (Police department drug testing regulations permissible because they require individualized suspicion).

that individualized suspicion of drug use is required before an employee may be required to submit to a drug test. The Third Circuit[12] and the Eighth Circuit[13], as well as the Washington Supreme Court here, have applied the administrative search exception, normally applied to business premises in highly regulated industries, to allow indiscriminate drug testing of employees. The Fifth Circuit has allowed indiscriminate drug testing of Custom Service employees after balancing the intrusion against the importance of the governmental interest.[14]

Recognizing the importance of this divisive issue, the Court has accepted review of two of these cases, the Ninth Circuit's decision in *Railway Labor Executives Assn. v. Burnley*[15] and the Fifth Circuit's decision in *National Treasury Employees Union v. Von Raab*.[16] The Washington court's decision here holds that the indiscriminate drug testing program imposed by WPPSS fits within the administrative search exception and does not violate the Fourth Amendment. This case raises the same issue that will be decided in *Burnley* and *National Treasury Employees*. Consequently, this case should be consolidated with the Court's

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12. *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986), *cert. denied*. 107 S.Ct. 577 (1986) (Horse racing is highly regulated industry; random drug testing of jockeys allowed); *Policemen's Benevolent Assoc. v. Township of Washington*, 850 F.2d 133 (3rd Cir. 1988) (Police are in a highly regulated profession and are therefore subject to random drug testing).

13. *Rushton v. Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988) (Administrative search exception justifies drug testing of workers at nuclear power plant); *See also, McDonald v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (Indiscriminate drug testing of prison guards justified by governmental interest in prison security).

14. *Treasury Employees v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988) (Indiscriminate drug testing of customs employees seeking promotions allowed under Fourth Amendment).

15. *Railway Labor Executives Assn. v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *cert. granted*, 108 S.Ct. 2033 (1988).

16. *Treasury Employees v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert granted*, 108 S. Ct. 1072 (1988).

review of the Ninth Circuit and Fifth Circuit drug testing cases, or a decision on this petition should be stayed pending the Court's decision in those cases.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Washington.

DATED this 13th day of October, 1988.

Respectfully Submitted,

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Seattle, Washington
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*Counsel of Record

APPENDIX A

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

RON ALVERADO, GORDON C. ARLT, DAVID T. BUSHEY, EDWARD K. BURSLEY, LYNN HAMMIT, DONALD JARRETT, IRA C. MARTIN, WILL MATHEWS, MICHEAL B. PARR, ART SCHMIDT and DAVID E. YORK *Plaintiffs,* v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM and BECHTEL CONSTRUCTION, INC., and/or BECHTEL POWER CORPORATION, (BECHTEL), *Defendants.*	NO. 86-2-01349-8 TRANSCRIPT OF TRIAL COURT'S ORAL DECISION

(On Friday, December 12, 1986, at 3:09 p.m., Court recessed until Monday, December 15, 1986, at 1:38 p.m., and after such recess, the following proceedings were had, to wit.)

THE COURT: Good afternoon.

MR LUND: Good afternoon.

THE COURT: I should indicate probably before I give any further remarks that I was cited to a case relating to the issue of presumption by Mr. Hafer and I assume you've advised counsel of that case, as well. That's the *Silkwood* case.

MR. HAFER: Yes.

THE COURT: And I have read that case and taken that into consideration with respect to that issue. The record before the Court consists of the affidavits of Hickman, Worthington and Logan.

MR. HAFER: Yes.

THE COURT: Supplemented by copies of documents relating to the development of the Defendant Supply System's Fitness for Duty Program and a number of corporate policies and procedures relating to that program adopted by the system, followed by Defendant Bechtel and challenged by the plaintiffs in this action.

I have carefully reviewed all of those materials and I am satisfied that the record has been sufficiently developed to enable the Court to render an informed judgment on the issue currently before it, that is, whether the plaintiffs are entitled to the issuance of a preliminary injunction immediately enjoining the defendants from further application and enforcement of the challenged Fitness for Duty Program insofar as that program requires urinalysis of applicants for employment with the defendants.

Legal justification for the issuance of a preliminary injunction at this juncture turns upon a determination whether the plaintiffs possess a well-grounded fear of the immediate invasion of clear legal rights which will result in actual and substantial injury to them. The Court's decision today is limited to that relatively narrow issue. Although that issue may generally be dispositive of the claims of the plaintiffs set forth in their complaint this action, there may

also as well be some specific issues of fact which merit further exposition and more detailed analysis by the Court in the context of a trial.

The issues raised by this action draw the Court into territory not fully explored for which the Appellate Courts of this state have not yet had the opportunity to provide detailed maps. In considering those issues, I am mindful of the substantial and serious interests which have been asserted by both the plaintiffs and the defendants in this action. Because this case is a case of first impression, prompt appellate consideration of the issues here presented is particularly appropriate and the Court's judgment should be framed in a way that will accommodate expedient appellant review.

First, I will address the jurisdictional argument which has been advanced by the Defendant Bechtel that the extensive regulation by the Nuclear Regulatory Commission of nuclear reactor safety and constitutes a Federal Preemption of that field which embraces Fitness for Duty Programs such as that in issue here and, therefore, precludes the application of Washington Law, including the provision of Article One, Section Seven of the Washington Constitution.

Although the language employed by the United States Supreme Court in the excerpt quoted in Bechtel's brief from the *Pacific Gas & Electric Co. vs. State* case, that the, quote, Federal government has occupied the entire field of nuclear safety concerns, end quote, suggests possible preemption. A reading of that case and the reading of the *Silkwood vs. McGee* case leaves me to conclude that Federal preemption has not appeared here and that this Court is possessed of jurisdiction to consider the application of state law urged by the plaintiffs.

The record indicates that the Nuclear Regulatory Commission deliberately refrained from adopting specific substance abuse avoidance and regulations and instead specifically deferred to the development of appropriate regulations in

that area by industry associations. Under those circumstances, I conclude that the Federal Government has not completely occupied that identifiable portion of the field of nuclear safety. Although Defendant Bechtel has not raised the question whether the projections of Article one, Section Seven are limited to State invasions of private affairs, the plaintiffs address that question in their brief.

While there is no definitive answer to that question by the courts of the State of Washington, the limitations of state action, if it does exist, is satisfied with respect to both of the defendants in this case. The Supply System is clearly a strategorily [sic] created political subdivision of the State of Washington. Bechtel's application of the Fitness for Duty Program formulated by the Supply System is under the authority and at the discretion of the Supply System. Bechtel is therefore acting under the authority of the State and its actions are subject to the inhibitions of Article One, Section Seven of the Washington Constitution.

The Plaintiff's Motion for a Preliminary Injunction requires that the Court undertake a three-step inquiry. First, do the plaintiffs identify a clear legal right? The gravimum [sic] of the plaintiffs' action is the right secured by Article One, Section of the Constitution of Washington, to be free from disturbance in their private affairs. No right is clear, nor more fundamental than that right. It is a right recognized by our State Supreme Court as affording greater protection to the individual even than those expansive guarantees of the Fourth Amendment of the United States Constitution.

Accordingly, the plaintiffs have satisfied the first step of the inquiry. Next, the Court must determine whether the plaintiff's possess a well-grounded fear of immediate invasion of that right. It is at this second step of inquiry that the issue is really joined in this case. This inquiry involves a definition and analysis of the articulated right, in this instance, the right to privacy provided by Article One, Section

Seven, and an analysis of the manner and extent to which the challenged policy of drug testing impinges upon that right.

The inquiry begins with the recognition that the right to privacy is not absolute. As the U.S. Supreme Court observes in *Terry vs. Ohio*, the specific content and incident of that right to privacy are shaped by the context in which it is asserted. Application of the right involves a balancing process, whereby the interest of the State in intruding upon the right is weighed against the right of the individual to be protected in his or her private affairs from such an intrusion. Virtually all of the State cases cited by the parties recognize and engage in that balancing process. It cannot be credibly argued and the defendants do not, that the required submissions of a urine sample for testing, does not represent an intrusion into the privacy of the plaintiffs.

Parenthetically, I use the word "intrusion" here rather than search because the plaintiffs have carefully and intentionally limited their challenge to Article one, Section Seven grounds and the use of the Fourth Amendment. Search is therefore somewhat inaccurate. However, the constitutional inquiry does not end with the finding of an intrusion. Indeed, intrusions of varying degrees by the State into our private affairs are bound [sic] on a daily basis.

As the record indicates and as I will discuss more fully in a moment, the employment process in which the plaintiffs will be involved in the event of their future employment with the defendants, involves numerous other intrusions into their private affairs which they do not here challenge. The issue then is not whether the challenged policy constitutes an intrusion into their right to privacy but rather whether the intrusion is reasonable, bearing firmly in mind the paramount guaranteed right of the individual to be secure in his or her private affairs.

This inquiry is guided by those cases which discuss the application of the Federal Fourth Amendment provision of

unreasonable searches and seizures. And those Washington cases, which specifically address Article One, Section Seven, those two analyses are overlapping and invariably intermingling in the State to privacy cases.

In the recent *Kuehn* decision, for example, the Supreme Court did not undertake separate discussions of Fourth Amendment search and seizure and Article One, Section Seven, right to privacy analyses, although the violation of both provisions was asserted and determined by the court to have occurred in that case. Consequently, Federal Fourth Amendment cases are germane in evaluating Article One, Section Seven claims.

However, as recognized by the Supreme Court in the *Gunwall* case, the protections afforded by Article One, Section Seven, based upon materially different language and historical anticedents [sic] than those of the Fourth Amendment, are more expansive than the Fourth Amendment protections. Fourth Amendment cases, while germane, are therefore not determinative of plaintiffs' claims here.

First, as to the Federal cases cited by the parties, it appears to me that virtually, all of those cases, in which searches were held to have violated the Fourth Amendment, dealt with searches under circumstances or involving methods which represented intrusions upon individual constitutional rights, significantly distinguishable from those presented here.

In *McDonnell vs. Hunter,* for example, drug testing of existing employees was at issue and positive test results were the basis for discharge from employment. In that case, the trial court, which was affirmed by the Eighth Circuit, noted that taking of specimens as part of pre-employment examinations would not be prohibited by the Fourth Amendment.

The *National Treasury Employees* case, in which the court balanced the governmental interests in testing all could [sic] be employees seeking against the intrusive effect of the testing program on individual rights, the circumstances and procedures differed materially from those here.

There, an observer was present during the taking of the specimen. Positive results were the basis for termination of employment. And the record before the Court apparently presented substantial issues as to the nature of testing procedures and their reliability. A couple of cases which upheld warrantless searches did so on the basis of factors similar to those present here.

In the *Shoemaker* case, for example, the Court relied heavily upon the heavily regulated nature of the horse racing industry and the public interest in maintaining its integrity and the consequences of diminished expectancy of privacy of jockies.

In the *City of Marietta* case, the Court, in upholding drug testing of employees, relied upon the fact that the tests were administered in a purely employment context as part of the government's legitimate inquiry into the use of drugs by employees engaged in extremely hazardous work.

In the case of *NCRB versus Labish Company,* at 538 F 2d 1267, a 1967 Seventh Circuit decison, urinalysys of bus drivers involved in serious accidents was upheld. The court noted that a governmental agency can place reasonable conditions on public employment and found that, in view of the government's paramount interest in protecting the public by ensuring that operators are fit to perform their duties, the plaintiff union members had no reasonable expectation of privacy with regard to blood and urine tests.

In *Balelo versus Baldrige,* the Ninth Circuit assumed the mandatory presence of government observers aboard tuna boats who could use what they observed in civil and criminal enforcement procedures represented a search but found that the search was not unreasonable in view of the highly regulated nature of the tuna fishing industry and the substantial public interest in the preservation of the tuna fishery.

What seems clear to me, all of the Federal cases and law affirmed is that the constitutional validity of drug testing must

be determined by a contextual analysis which carefully balances the public interest which promotes the intrusion against the rights intruded upon.

Turning to the state decision, it is first apparent that the same balancing is required in Article One, Section Seven analyses. In the *Kuehn* and *Jacobsen* cases, for example, the Court acknowledged that an important consideration in the weighing of public needs against individual rights is the availability of less burdensome alternatives to the intrusion.

In the *Kennedy* decision, the court notes that whether an unlawful search has occurred is based upon determining whether the state, quote, unreasonably intrudes into private affairs, end quote.

In *State versus Stroud,* in which the court retreated substantially from its earlier holding in the *Ringer* decision, the court noted that although Article One, Section Seven affords expanded protection, the extent of that protection is determined by weighing, in that case, involving an automobile search, the exigency callings for the search against the expectation of privacy possessed by the automobile's occupants. The balancing required involved three general considerations. One, the public interest which is advance by the challenged intrusion; two, the right to privacy upon which the intrusion is made, and three, the nature and extent of the challanged intrusion.

First, the public interest here involved is the interest in the safe maintenance and operation of a nuclear reactor which, if improperly maintained and operated, may constitute a substantial hazard to the safety of both the public and workers at the reactor and in the maintenance of security surrounding the reactor and the Hanford Reservation in which it is located.

The record clearly establishes the substantial need for safety. In probability, no industry is the strict compliance with carefully prescribed safety measures of more critical

importance than in the nuclear industry. Each of the safety precautions discussed in the record carry extraordinary implications for the welfare of the workers and the reactor and the public at large.

Each of these precautions are distinctive and detailed in nature, often involving strict sequential steps, the maintenance and repair of the complex, sophisticated and intricate systems of the reactor, including its redundant safety systems, is undertaken by craftsmen of which the plaintiffs are representative. Their work requires skill, concentration and adherence to detailed safety protocals.

Both the secretive, classified nature of work done within the Hanford Reservation, within which P-2-2 is located and the potential danger to public safety and security of the removal or misuse of materials utilized at the reactor demonstrate that a substantial security interest is also implicated.

Next, the privacy interest asserted by the plaintiffs must be carefully reviewed. Those cases which have spoken in terms of constitutional rights to privacy have defined the privacy interest involved in terms of the reasonable expectations of privacy which exist under the specific circumstances in which the right is asserted. And those cases recognize that there may be diminished expectations of privacy and consequently a reduced privacy interest under certain circumstances.

I believe the circumstance surrounding the plaintiffs in this case demonstrates such a diminished expectation of privacy. The first important circumstance is the significantly regulated nature of the industry.

Nuclear reactor operators are to be continually examined and reviewed by the Federal Nuclear Regulatory Commission. Those who seek to be employed in such an industry necessarily must reasonably expect more intrusions into their privacy than those who seek employment in other less regulated areas.

The specific context in which plaintiffs assert their rights to privacy must also be explored. The plaintiffs are applicants or expected to be applicants for employment, as the Maryland attorney general's opinion, cited by the plaintiffs, notes the collection of personal information from applicants demonstrably relevant to employment requirements inheres in the employment and hiring process.

Moreover, one of the attributes of employment of the plaintiffs by the defendants is the access to and work within a highly secured area. Such employment involved daily confrontation with new rules, security restraints, including routine physical searches and continuous sensory surveillance.

The record before the Court also demonstrates that application for employment with the defendants involves a number of other significant intrusions into the applicants' private affairs, including psychological and medical examinations, detailed background checks, criminal history investigations and financial history investigations, to none of which have the plaintiffs interposed objections.

It is my conclusion, on the basis of the foregoing circumstances, that the plaintiffs' reasonable expectations of privacy within the context of their employment by the defendants are significantly diminished.

Finally, a right to privacy analysis requires consideration of the degree and nature of the intrusion challenged. In this regard, I have particularly considered the following factors:

First, the usual test is required of all job applicants with access to secure areas or for periods of employment in excess of 30 days. Second, the Fitness for Duty policy has been carefully tailored to address concerns of individual dignity and privacy. The specimen is collected by the applicants privately without the presence of an observer. The collection occurs at a medical facility and is conducted under the supervision of medical personnel. Strict measures of confidentiality are employed.

Third, the policy is carefully restricted to employment, fitness issues. No punitive elements exist. The only consequence of a positive test result is termination of considertion for employment for 90 days. Fourth, the policy incorporates substantial safeguards to ensure test reliability. Every specimen is subjected to two independent methodologist.

In the event of a positive result, a second specimen is tested by a second testing laboratory employing two different testing methodologists. All four tests must be positive to result in a distinction of consideration for employment under the Fitness for Duty policy.

Fifth, there is no physical invasion of the body as occurs, for example, in blood specimens. As I indicated a moment ago, no other person is present for or involved in the actual collection of the urine specimen. Sixth, the record does not reflect any less intrusive alternative means of determining a substance abuse potential or problem in applicants for employment.

The plaintiffs have placed a great deal of emphasis upon the fact that the policy does not require testing except based upon cause for existing employees as an indication that the policy as formulated is not effective. However, the policy does include a continuous behavioral observation program of existing employees which ensures trained methodical observation of employees that is simply not available with respect to new employees.

Even those previously employed have not been subjected to the continuous trained observation to which current employees are exposed, pursuant to the continuous behavioral observation program. Based upon the foregoing, I find the extent of the intrusion to be carefully limited.

Finally, the Court of Appeals, in the very recent decision in the *Fury* case, utilized an objective intrusion analysis which may additionally be helpful in this case. In terms of the objective intrusion, as I have already discussed, it seems to me that

the intrusion represented by the urinalysis procedures embodied in the Fitness for Duty policy are less intrusive than blood tests and no more intrusive than a number of other unchallenged intrusions which are components of the hiring process, including medical and psychological examinations and numerous background investigations.

Subjectively, I find the challenged policy to effectively ameliorate much of the concur or announce and embarrassment which other cases have noted by providing advanced notice of the requirements, procedural requirements, that address privacy and personal dignity, confidentiality and dependability of the test results and a uniform application of the policy to all employment applicants.

I find that the public interest which inheres in the challenged intrusion is substantial, that the expectancy of privacy and therefore the right to privacy enjoyed by the plaintiffs, in the context in which it is asserted in this case, is significantly diminished and that the nature and extent of the intrusion has been carefully limited by the Fitness for Duty policy and is minimal.

Whenever the rights of the individual to be secure in the privacy of his affairs collides with an intrusion by the state upon those rights, the intrusion must be meticulously scrutinized.

In this case, I have attempted to undertake that meticulous scrutiny and I find that the intrusion embodied in the defendant's Fitness for Duty policy has withstood that scrutiny. Accordingly, the plantiffs' Motion for a Preliminary Injunction in this matter is denied.

MR. HAFER: Thank you, Your Honor. Will the Court enter an order or do you want us to tender a form?

THE COURT: I will sign an order upon presentation consistent with the Court's decision.

MR. RASMUSSEN: Do you want to take this up?

MR. HAFER: Yes.

MR. RASMUSSEN: Is that in the nature of an order?

MR. HAFER: Yes.

MR. RASMUSSEN: Would the Court be of a mind to see that it is appealed promptly then?

THE COURT: I think that would be in the best interests of the parties. And my position is that I would accommodate, in signing an order, an order that would permit that expedient appeal to occur.

MR. HAFER: I will want to check the Appellate practice rules to be sure that the order is in conformity. I believe, not as a result of the decision but how the decision was framed, that this would be an appropriate case, I believe, in view of the findings of the Court, it is presently appropriate for such review. And apparently, you feel the same way.

THE COURT: That's my feeling, as well. I would like to accommodate that.

MR. HAFER: On behalf of my clients and the building trades, as well, we want to thank the Court for a very careful and thoughtful opinion. We disagree, we hope it will be reversed but, nonetheless, appreciate the care the Court has shown.

THE COURT: Thank you, all counsel, for your briefings and arguments. They have been very helpful to the Court. Thank you.

MR LUND: Thank you, Your Honor.

THE COURT: Court is adjourned.

(At 2:08 p.m., court stood in recess, end of transcript.)

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THE COUNTY OF BENTON

RON ALVERADO, et al., *Plaintiffs,* v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al., *Defendants.*	No. 86-2-01349-8 ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter having come before the Court on a stipulated record and the Court being fully advised and it being the decision of the Court that Defendants shall prevail,

NOW, therefore, it is ordered, adjudged and decreed that Defendants' motions for summary judgment are granted and the complaint is dismissed with prejudice and without costs.

Dated this _____ day of January, 1987.

/s/
Superior Court Judge

Approved as to form and
notice of presentation waived:

/s/
Counsel for Plaintiffs

/s/
Counsel for Defendant Bechtel

/s/
Counsel for Defendant WPPSS

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

RON ALVERADO, GORDON C. ARLT, DAVID T. BUSHEY, EDWARD K. BURSLEY, LYNN HAMMIT, DONALD JERRITT, IRA C. MARTIN, WILL MATHEWS, MICHEAL B. PARR, ART SCHMIDT and DAVID E. YORK, *Appellants,* v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM (WPPSS) and BECHTEL CONSTRUCTION, INC., and/or BECHTEL POWER CORPORATION, (BECHTEL), *Respondents.*	NO. 53616-3 En Banc Filed_____.

UTTER, J. — Plaintiffs brought an action to permanently enjoin the Washington Public Power Supply System (WPPSS) and Bechtel Construction, Inc. (Bechtel), a WPPSS contractor, from implementing a mandatory urinalysis drug testing program for prospective employees. Plaintiffs argue that this urinalysis program is an unlawful search and seizure under article 1, section 7 of the Washington Constitution. On a stipulated motion for summary judgment, the trial court granted the defendants' motion and dismissed the action. We find that federal regulations preempt the application of state law in this instance, and uphold the WPPSS preemployment drug screening under the administrative search exception to the fourth amendment to the United States Constitution.

WPPSS is a municipal corporation and joint operating agency created under RCW 43.52.250 *et seq*. It consists of 13 Washington public utility districts and 3 municipalities. WPPSS owns and operates Washington Nuclear Plant 2 (WNP 2), a commercial nuclear reactor located on the Hanford Nuclear Reservation in Benton County. Defendant Bechtel is a construction and maintenance contractor at WNP 2.

Plaintiffs in this action are members of Plumbers and Pipefitters Local 598. The union members are not employees of WPPSS but are instead hired by Bechtel to work on repairs and maintenance at WNP 2 when the plant is temporarily shut down. If hired to work at WNP 2, they must qualify for "special access' authorization which would allow them to work unescorted in all protected or vital areas of the plant. Because of the sensitive nature of the work, all jobs require the utmost skill, concentration and ability to follow established protocol. Before being hired, employees are subject to security screening, background investigation and psychological evaluation.

Only one of the plaintiffs has been a successful applicant for Bechtel employment at WNP 2. The other plaintiffs claim they reasonably expect to be employed during future shutdowns of the plant. When not working for Bechtel at WNP 2, the plaintiffs are likely to be working for another employer on an unrelated project.

WNP 2 has an operating license granted by the Nuclear Regulatory Commission (NRC) and virtually all of its activities are regulated by the NRS pursuant to authority granted to it under the provisions of the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq*. (1982). The NRC sets the standards and regulates the operation of all commercially operated nuclear power plants in the United States. NRC regulations of commercial nuclear facilities such as WNP 2 are pervasive, particularly in matters pertaining to safety. In

the 3½ decades of federal regulation of this industry, the Atomic Energy Commission and its successor, the NRC, have developed an extensive array of regulations touching nearly every aspect of plant operations, including personnel. *See* 10 C.F.R. §§0-199 (1987). The NRC maintains resident inspectors at the plant site to assure compliance with these regulations. This detailed oversight by the NRC enhances the safety of the highly complex and dangerous work performed at a nuclear power facility.

On August 5, 1982, the NRC published a proposed rule which would have required, as a condition of licensure, the adoption of programs assuring that personnel with unescorted access to protected areas of a nuclear plant are not under the influence of drugs or alcohol, or are not otherwise "unfit for duty". *See* 47 Fed. Reg. 33, 980. However, the NRC deferred imposing fitness-for-duty (FFD) requirements for 2 years and instead agreed to accept a substitute program initiated by the nuclear utility industry. This industry initiative was coordinated by three associations: the Nuclear Utility Management and Human Resources Committee (NUMARC), Institute for Nuclear Power Operation (INPO) and Edison Electric Institute (EEI). The industry-initiated program is subject to the approval of the NRC.

In response to the NRC's proposed rule and the industry's recommendation, WPPSS established a "fit for duty" (FFD) program that followed industry guidelines and met the requirements of the NRC. WPPSS' FFD program went into effect on June 2, 1986 for WPPSS employees and August 1986 for contractor employees. This program requires new employees hired for over 30 consecutive days or any employee hired in a capacity requiring unescorted access to WNP 2 to undergo chemical testing as part of the preemployment medical evaluation. Current employees and previously tested employees, rehired within 1 year of termination, are not tested, except for cause. As required by WPPSS, Bechtel

incorporated this drug screening program into its application process for those jobs it performs during plant shutdowns.

The FFD program challenged by the prospective employees in this case contains the following significant features: multiple tests to confirm a "positive" test result, a written protocol assuring proper "chain of custody"; non-witnessed urine sample collection in a medical facility; testing of existing employees on a "for cause" basis and testing of all new hires (both contractor and WPPSS employees); and strict confidentiality of test results. The results of the test are for internal use only and will not be divulged to law enforcement agencies. The worst that can happen to a prospective employee who tests positive after several tests is that he is precluded from work at WNP 2 for 6 months.

In August 1986, the NRC formally withdrew the rule it had proposed 2 years earlier and instead published a "Statement on Fitness for Duty of Nuclear Power Plant Personnel." *See* 51 Fed. Reg. 27,921. In this statement, the NRC announced three major expectations of nuclear utilities in the effort to maintain a drug free work force: (1) to prohibit the sale, use, possession of alcohol or drugs within plant protected areas; (2) to require persons within plant protected areas to be fit for duty (*i.e.*, not under the influence of alcohol or drugs); and (3) to include certain minimum provisions regarding personnel access to vital areas, sanctions in the event of substance abuse, and "[e]ffective monitoring and testing procedures to provide reasonable assurance" that personnel in vital areas are fit for duty.

The NRC stated further that it would refrain from making any new rules in this area for another 2 years subject to the continued success of the industry initiatives and the NRC's ability to monitor the effectiveness of these programs. While allowing the commercial nuclear power industry some flexibility in implementing a FFD program, the NRC policy statement makes clear that it was not relinquishing its

authority in this area and would not hesitate to impose sanctions on those facilities whose anti-drug programs were deficient. *See Rushton v. Nebraska Public Power Dist.*, 653 F.Supp. 1510, 1514 (D. Neb. 1987), *affirmed* 844 F.2d 562 (8th Cir. 1988) (discussing the same NRC policy at issue in this case).

On December 3, 1986, plaintiffs filed a motion in Benton County Superior Court to preliminarily enjoin defendants from requiring job applicants to submit to drug testing as a condition of employment. The trial court denied the motion on December 15, 1986 and subsequently issued an order granting defendants' motion for summary judgment and dismissing the complaint with prejudice. Plaintiffs filed a notice of appeal on February 24, 1987. Believing this matter to involve "a fundamental and urgent issue of broad public impact", RAP 4.2(a)(4), this court granted direct review.

This court's review of a summary judgment is de novo. Accordingly, a summary judgment will be affirmed if the pleadings, affidavits and admissions on file show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The record in this case is stipulated and there are no genuine issues of material fact. No questions are raised regarding the reliability of the particular method of urine testing, the dimensions of the drug abuse that actually exists among nuclear power facilities, or the efficacy of this program in dealing with the problem. Furthermore, plaintiffs challenge only that part of the FFD program at WPPSS mandating a urinalysis drug screening for prospective employees.

I

Plaintiffs challenge the drug screening program as being unlawful under Const. art. 1, § 7 of the Washington Constitution. However, the constitutional principle of federal

preemption precludes application of the state constitution to determine the validity of this drug testing program.

The issue of federal preemption was not raised by the parties in arguments before this court. However, this court has inherent authority to consider issues not raised by the parties if necessary to reach a proper decision. *See Seigler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1972); RAP 12.1(b). It is proper to do so when there is no dispute about the law. We conclude that consideration of federal preemption doctrine is necessary to properly resolve the matter before us. Although we frequently request further briefing or perhaps reargument on issues raised by the court, *see State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982), we decline to do so here for reasons of judicial economy.

First, there is only one opinion by the United States Supreme Court regarding attempted state regulation of safety aspects of nuclear power facilities and it concludes, unequivocally, that "the entire field of nuclear safety concerns" has been preempted by federal law; there is simply no room for the application of state law to matters affecting nuclear safety. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983). Therefore, further briefing on this issue by the parties is unlikely to lead this court to a contrary conclusion.

Second, our ruling on this issue does not work any injustice to the parties since the issue was raised in the trial court and the parties had notice that federal preemption could apply.

Third, the trial court did consider the issue and incorrectly concluded that *Pacific Gas & Elec.* did not deprive the court of jurisdiction or prevent it from applying state law. We conclude otherwise. Record of Proceedings, at 64-65. While *Pacific Gas & Elec.* does not deprive state courts of jurisdiction, it does narrow the scope of the court's analysis to federal law. The drug testing program at WNP 2 derives from

federal authority and involves an area of public policy in which state action and state law has been preempted.

The doctrine of federal preemption is rooted in the "supremacy clause" of article 6, clause 2 of the United States Constitution which declares that the constitution and laws of the United States "shall be the supreme law of the land". Under the preemption doctrine, states are deemed powerless to apply their own law due to restraints deliberately imposed by federal legislation. In such cases,

> . . . *any* state or local action, however consistent in detail with relevant federal statutes, is held invalid . . . because the federal legislative scheme announces, or is best understood as implying, a congressional purpose to "occupy the field."

L. Tribe, *American Constitutional Law* § 6-25, at 479 (2d ed. 1988).

State law can be preempted in one of two ways. If Congress indicates an intent to occupy a given field, any state law falling within that field is preempted. *Fidelity Fed. Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 1272 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 2d 1447, 67 S. Ct. 1146 (1947). Even if Congress has not indicated an intent to "occupy the field", state law is still preempted to the extent that it would actually conflict with federal law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963). State law is also preempted when it would hinder accomplishment of the full purposes and objectives of the federal regulations. *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 2d 581, 61 S. Ct. 399 (1941).

Numerous cases have recognized the strong federal interest in atomic energy development and the concomitant preemption of state regulation over nuclear power operations. The preemption issue first arose in the nuclear energy context in *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *summarily aff'd*, 405 U.S. 1035 (1972). That court

traced the history of atomic energy development in the United States from a government monopoly through the congressional decision in the Atomic Energy Act of 1954 (and subsequent modifications) to encourage commercial development under strict licensing arrangements. Concluding that states were precluded from regulating the discharge of radioactive effluence from nuclear facilities, the court concluded that "the federal government has exclusive authority under the doctrine of pre-emption to regulate the construction and operation of nuclear power plants..." *Northern States*, at 1154. *See* Note, *A Framework of Preemption Analysis*, 88 Yale L.J. 363, 379-81 (1978). The Supreme Court reaffirmed its memorandum holding in *Northern States* in *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 17, 48 L. Ed. 2d 434, 96 S. Ct. 1938 (1976).

While there is a presumption against finding federal preemption in ambiguous cases, *Maryland v. Louisiana*, 451 U.S. 725, 746, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981), nuclear safety regulations present no such ambiguity. Indeed, the matter of safety at nuclear power facilities is a classic example of congressional intent to "occupy the field" and preempt *any* state action. As one learned treatise in this field has commented:

> "The federal licensing scheme to control the development and utilization of atomic energy... is extraordinarily pervasive, probably more pervasive than any regulatory scheme considered by the Supreme Court in analogous [pre-emption] cases..."

Stason, Estep & Pierce, *Atoms and the Law*, 1059 (1954) (cited in *Northern States*, at 1153).

In *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983), the United States Supreme Court stated unequivocally that any state action pertinent to safety

at a nuclear power facility was preempted, regardless of whether it conflicted with federal objectives. The Court found that "the Federal Government has occupied the *entire* field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Elec.*, at 212. These limited powers include the regulation of radioactive effluence and the right to impose certain site and land-use requirements for the construction of nuclear power facilities. *Pacific Gas & Elec.*, at 212 n.25. States are also generally free to apply their own tort law to compensate persons for injuries related to radiation hazards, to the extent that such state laws do not significantly interfere with federal regulation. *Goodyear Atomic Corp. v. Miller*, ____ U.S. ____, ____ L. Ed. 2d ____, 108 S. Ct. 1704 (1988); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-256, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984). While the states are generally free to regulate the *economic* aspects of nuclear power, *Pacific Gas & Elec.*, at 622, matters of nuclear *safety* are governed by federal law alone.

The drug testing program at issue in this case was instigated in an effort to promote safety at a federally regulated nuclear power plant. The plan was adopted pursuant to the express policy of the Nucler Regulatory Commission engendered by the substantial increase in drug-related incidents involving personnel at nuclear power facilities. *Rushton*, at 1513. *See* Starr, *Drug Abuse at Nuclear Plants: The Alarm Bells Are Ringing*, Business Week (Oct. 28, 1985). While the NRC did not mandate the specific details of the WPPSS drug testing program, its August 1986 policy statement indicates that adoption of an effective drug testing program was a condition of continued licensure.

Since this safety issue was not "expressly ceded to the States", *Pacific Gas & Elec.*, at 212, federal law and regulations preempt state law. The constitutional validity of this drug testing program adopted pursuant to federal

requirements in an industry that is pervasively regulated by the federal government must be determined by reference to the federal constitution alone. In this instance, it requires analysis under the Fourth Amendment.

II

The Fourth Amendment protects against unreasonable searches and seizures. The reasonableness of a search or seizure depends upon a person's expectation of privacy in the place to be searched or the items seized, provided that the expectation is one that society is prepared to accept as "reasonable". *Katz v. United States*, 389 U.S. 347, 361, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) (Harlan, J., concurring).

Government mandated urinalysis for drug testing of employees has been held to constitute a search and seizure within the meaning of the Fourth Amendment in every case in which the issue has arisen. *See, e.g., Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, ____ U.S. ____, ____ L. Ed. 2d ____, 108 S. Ct. 2033 (1988); *Everett v. Napper*, 833 F.2d 1507, 1509 (11th Cir. 1987); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *National Treasury Employees v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987), *cert. granted*, ____ U.S. ____, ____ L. Ed. 2d ____, 108 S. Ct. 1072 (1988); *McDonnell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Taylor v. O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987); *Smith v. White*, 666 F. Supp. 1085, 1089 (E.D. Tenn. 1987); *Rushton v. Nebraska Public Power Dist.*, 653 F. Supp. 1510, 1523-24 (D. Neb. 1987), *affirmed* 844 F.2d 562 (8th Cir. 1988); *Lovvorn v. Chattanooga*, 647 F. Supp. 875, 879 (E.D. Tenn. 1986); and *Capua v. Plainfield*, 643 F. Supp. 1507, 1513 (D. N.J. 1986).

We agree with these courts that compulsory urinalysis under federal regulations qualifies as a search and seizure

within the meaning of the Fourth Amendment. It invades an individual's reasonable and legitimate expectation of privacy and should not be tolerated unless the program meets constitutional safeguards.

This conclusion does not end the Fourth Amendment inquiry, however. "The Fourth Amendment safeguards persons only against 'unreasonable searches and seizures.'" *National Fed's*, 818 F.2d at 942. Whether a search is unreasonable and hence unlawful under the Fourth Amendment depends, in part, on the context within which it takes place and the manner in which it is conducted. *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985).

III

A search and seizure is not constitutionally reasonable under the Fourth Amendment unless it is conducted pursuant to a valid warrant based upon probable cause to believe that a violation of law has occurred. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 277, 37 L. Ed. 2d 59, 93 S. Ct. 2535 (1973) (Powell, J., concurring); *New Jersey v. T.L.O.*, 469 U.S. 325, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985). The warrant requirement is subject to only a few "specifically established and well-delineated" exceptions. *See Mincey v. Arizona*, 437 U.S. 385, 390, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). A search that is neither supported by a warrant nor comes within one of the narrow exceptions to the warrant requirement is per se unreasonable and unconstitutional.

Since WPPSS does not have a warrant to conduct these searches, its drug testing program must meet the requirements of one of the narrow exceptions to be constitutionally valid. Given the pervasive regulations governing all

operations of the nuclear power industry, we find the administrative search exception to be appropriate in evaluating the constitutionality of drug testing at WNP 2.

In a long line of cases beginning with *Camara v. Municipal Court*, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967), the United States Supreme Court has set forth the requirements for valid administrative searches. Because routine inspections are often essential to adequate enforcement of valid government regulation, probable cause is not required. While warrants are still required for code-enforcement inspections of a home and most businesses, *Camara v. Municipal Court, supra,* and *See v. Seattle*, 387 U.S. 541, 18 L. Ed. 2d 943, 87 S. Ct. 1737 (1967), warrantless searches are constitutionally tolerable as an exception to the warrant requirement for administrative inspections in "pervasively regulated industries." *See Colonnade Catering Corp. v. United States*, 397 U.S. 72, 25 L. Ed. 2d 60, 90 S. Ct. 774 (1970) (liquor business); *United States v. Biswell*, 406 U.S. 311, 32 L. Ed. 2d 87, 92 S. Ct. 1593 (1972) (firearms and munitions dealers); *Donovan v. Dewey*, 452 U.S. 594, 69 L. Ed. 2d 262, 101 S. Ct. 2534 (1981) (underground and surface mines); and *New York v. Burger*, ____ U.S. ____, 96 L. Ed. 2d 601, 107 S. Ct. 2636 (1987) (automobile junkyard).

There is no doubt that the nuclear power industry is such a "pervasively regulated industry". As stated above, virtually *all* of the activities involved in operating a nuclear power facility such as WPPSS are regulated by the Nuclear Regulatory Commission pursuant to an act of Congress. *Rushton*, 653 F. Supp. at 1525; *Smith v. White, supra* at 1086.

Balancing societal and individual interests is appropriate in determining the reasonableness of a warrantless administrative search in a pervasively regulated industry because searches in these contexts involve only limited threats to an individual's justifiable expectation of privacy.

Biswell, at 316. *See Washington Massage Found. v. Nelson*, 87 Wn.2d 948, 953, 558 P.2d 231 (1976). The urinalysis involved here is neither an attempt to find evidence of wrongdoing nor to verify compliance with law; it is simply an effort to determine whether a particular applicant is physically and mentally fit for the job being sought. The work to be performed by these employees demands that each of them be fully alert at all times while on the plant site. The lingering effects of drug abuse can impair one's physical and mental capacity, and such impairment can have catastrophic consequences in the setting of a nuclear power facility. In a preemployment context there is no opportunity for supervisors or coworkers to observe behavior which could alert the employer to drug impairment.

The pervasiveness of the regulatory scheme gives advance warning to those employed in the nuclear power industry that their legitimate expectations of privacy are substantially diminished.[1] This principle holds true whether the search is of the premises or of individuals employed on the premises. *See Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d at 566 (nuclear power); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, ____ U.S. ____, 93 L. Ed. 2d 580, 107 S. Ct. 577 (1986) (horse racing); and *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (correctional institution).

Application of the administrative search exception to personal searches in the form of employee drug testing has been

---

[1] Some courts and commentators have gone further and suggest that a prospective employee has no Fourth Amendment protection from a government mandated urinalysis. *See McDonell v. Hunter*, 612 F. Supp. 1122, 1130 n.6 (D.C. Iowa (1985), *modified on other grounds*, 809 F.2d 1302 (8th Cir. 1987)); *Lovvorn*, 647 F. Supp. at 881 n. 7; *McCleod v. Detroit*, 39 Fair Empl. Prac. Cas. 225 (BNA 1985); Note, *Employee Privacy Rights v. Business Needs: Drug Testing in the Workplace*, 22 New England L. Rev. 413, 417 n.26 (Dec. 1987); Lundberg, *Mandatory Unindicated Urine Drug Screening: Still Chemical McCarthyism*, 256 J. A.M.A. 3003, 3005 (1986).

criticized by some courts and commentators. *See* Comment, *Shoemaker v. Handel: Alcohol and Drug Testing and the Pervasive Regulation Exception to the Fourth Amendment's Administrative Search Warrant Requirement*, 14 Hastings Const. L.Q. 173, 191-93 (1986). The essence of this criticism is that the administrative search doctrine has not been applied to individual searches before. But the reason why this doctrine has not previously been applied is that the underlying regulations for earlier administrative searches were concerned only with non-human factors in the workplace and there was no need to search individuals; in this instance, however, individuals employed in the nuclear power industry are the focus of the underlying federal regulations.

A panel of the Court of Appeals for the Ninth Circuit has recently ruled that the administrative search exception did not allow for government mandated drug testing of railway employees. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 583-86 (9th Cir.), *cert. granted*, ____ U.S. ____, ____ L. Ed. 2d ____, 108 S. Ct. 2033 (1988). The court determined that despite the long history of close regulation of the railroad industry, the safety regulations were more directed at the premises, equipment and records of the owners and managers in the industry rather than their employees; since employees were not historically the focus of federal safety regulations, they could not have "put railroad employees on notice that their participation in the industry reduces their legitimate expectations of privacy in the integrity of their bodies." *Burnley*, at 585. In the absence of such notice, drug testing through urinalysis was too serious a personal intrusion to be accepted under the administrative search exception.

The decision by the Ninth Circuit did not foreclose application of the administrative search exception to searches of employees engaged in heavily regulated industries. In fact, that court cited approvingly the decision by the Third Circuit in *Shoemaker* which applied this exception in upholding the

warrantless breath and urine testing of jockeys in the heavily regulated New Jersey horseracing industry. The Ninth Circuit panel states that the search exception in *Shoemaker* was acceptable because in the regulatory scheme for the horseracing industry the jockeys are the principal regulatory concern. *Burnley*, at 585. The court noted that the jockeys were subject to thorough personal background investigations and constant monitoring, all of which gave the jockeys advance notice that their involvement in horseracing reduces their legitimate expectations of privacy. The court also distinguished the two cases on the ground that the New Jersey Racing Commission has always had the authority to set the qualifications for jockeys whereas the Secretary of Transportation is expressly precluded from exercising similar oversight of railway employees.

Considering those factors identified by the Ninth Circuit in *Burnley*, we conclude that the prospective employees at WNP 2 have much more in common with the jockeys in *Shoemaker* than the railroad employees in *Burnley*. Like the jockeys but unlike the railroad employees, the workers at WNP 2 are subject to intensive background investigations which include credit checks, criminal records, medical and psychological evaluations; like the horseracing industry but unlike the railway industry, the regulatory agency with oversight of the nuclear power industry has the authority to establish the qualifications for employees; like the jockeys but unlike railroad employees, workers in the nuclear power industry are a "principal regulatory concern." As defendant Bechtel stated during argument in the court below,

> The premise of the Federal Atomic Energy policy has been that of trying to eliminate as much as possible any human error... to make it as perfect as it could be.

Record of Proceedings, at 50. These extensive regulations have given prospective employees at WNP 2 advance notice of their diminished rights of privacy. This approach has

generally won approval even among those courts that have rejected drug testing in other circumstances. *See Capua v. Plainfield*, 643 F. Supp. 1507, 1518 (D. N.J. 1986); *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380, 386 (E.D. La. 1986), *rev'd*, 816 F.2d 170 (5th Cir. 1987); and Note, *A Proposal for Mandatory Drug Testing of Federal Civilian Employees*, 62 N.Y.U. L. Rev. 322, 345 (1987).[2]

We conclude that the administrative search exception for pervasively regulated industries may be extended to employees in the nuclear power industry. Even in pervasively regulated industries, however, the test for constitutional validity goes beyond a simple weighing of governmental versus individual interests. In *Burger*, the United States Supreme Court interpreted its *Dewey* decision as establishing three criteria for warrantless searches in pervasively regulated industries:

> First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made....
>
> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme."...
>
> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."...

Burger, 96 L. Ed. 2d at 614. Examples of a "constitutionally adequate substitute" include prior warning to those persons to be searched, limiting the scope of the search, and clear restraints upon the discretion of the investigating officers. *Burger*, at 614.

These criteria are the proper ones to be applied in evaluating the constitutionality of the WPPSS drug testing program. First, the

---

[2] We also find support for this position in current congressional legislation dealing with the use of polygraph tests by employers. Both houses of Congress have recently passed legislation that would severely restrict the use of polygraph tests by private employers, but allows such testing of current and prospective employees of the nuclear power industry. *See* H.R. 1212, 100th Cong., 2d Sess., §7(e) (1988).

"substantial government interest" at stake in this program is to ensure that personnel in vital areas of a nuclear power facility are fit for duty in one of the most sensitive and demanding industries in our economy; the public safety concerns are overwhelming.

Second, the warrantless inspections are necessary in this instance to further these public safety interests. The responsibilities of employees in vital areas of a nuclear power facility are of such a nature that any drug related impairment could have very serious consequences for the general public. Because of the government's overriding interest in preventing any drug-impaired employee from working in one of these vital areas, and the difficulty in determining by mere visual observation whether a prospective employee suffers from such impairment, routine drug testing in the context of preemployment screening is virtually the only way in which the operators of the WPPSS facility can effectively monitor compliance. *See* 3 W. LaFave, *Search and Seizure* § 10.2, at 33 (2d ed. 1988).

Third, the drug testing program contains "constitutionally adequate substitutes" for a warrant. All prospective employees are informed well in advance that a urinalysis will be necessary before they are hired for work; thus the testing requirement comes as no surprise to them. The scope of this "search" is limited in that a nonwitnessed sample is collected in a medical facility and the results are kept confidential. Furthermore, the program provides for multiple tests if an applicant tests positive and the results are used only for the purpose of determining a prospective employee's fitness for duty. The only consequence of a positive test is that a prospective employee will not be considered for employment for 6 months. There is no permanent "stain" on an applicant's record. Because all prospective employees are so tested, the investigating officers have little, if any, discretion.

IV

In conclusion, the doctrine of preemption renders our state constitution irrelevant to the issues presented by this drug testing program and the case must be decided on Fourth Amendment grounds alone. Applying the Fourth Amendment only, the drug testing program being implemented at the WPPSS facility for prospective employees is constitutional. It passes constitutional muster, however, not simply because society's interest in safety is greater than the individual's interest in privacy, but because the program meets the strict criteria announced by the United States Supreme Court to justify a warrantless administrative search.

We affirm summary judgment for the defendants.

APPENDIX C

Fourth Amendment, Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, Section 7, Constitution of the State of Washington

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*

§ 2011. Declaration

Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that —

(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and

(b) the development, use and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

§ 2012. Findings

The Congress of the United States hereby makes the following findings concerning the development, use and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) [Repealed]

(c) The processing and utilization of source, byproduct, and special nuclear material affect insterstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this Act.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

(h) [Repealed]

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

§ 2013. Purpose

It is the purpose of this Act to effectuate the policies set forth above by providing for —

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and producton of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons.

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extend consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

. . .

§ 2018. Agency jurisdiction

Nothing in this Act shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission: Provided, That this section shall not be deemed to confer upon any Federal, State, or local agency any authority to regulate, control, or restrict any activities of the Commission.

. . .

§ 2021. Cooperation with States

(a) **Purpose.** It is the purpose of this section —

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this Act of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;
(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials;
(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproducts, source, and special nuclear materials, and the assumption thereof by the States;
(5) to provide for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with the states; and
(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable.

. . .

(k) **State regulation of activities for purposes other than protection against radiation hazards.** Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

APPENDIX D

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THE COUNTY OF BENTON

RON ALVERADO, et al., *Plaintiffs,* v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al., *Defendants.*	No. 86-2-01349-8 AFFIDAVIT OF JANET M. HARDING

STATE OF WASHINGTON
COUNTY OF BENTON ss.

Janet M. Harding, being first duly sworn upon oath, deposes and says:

1. I am the above-named affiant and am familiar with the facts and circumstances in the above-named case. I have personal knowledge as to the facts testified to herein.

2. I am the Director of Human Resources for Washington Public Power Supply System ("Supply System") reporting directly to the Managing Director of the Supply System. I am responsible for all personnel policies and procedures, including employment, compensation and benefits, union relations, supervisory management education, equal employment, Fitness-for-Duty and continued behavioral observation.

3. I participated in the development of the Supply System's Fitness-for-Duty program. Attached hereto is Corporate Policy and Procedure (CPP) 1.2.44, the Supply

System's Fitness-for-Duty policy, and applicable Human Resources Instructions (HRIs) which I incorporated into my affidavit. Drug screening was instituted as one part of this program whose overall purpose is to ensure that employees work in a safe, productive and healthy environment.

4. The program was developed to respond to the expectations of the Nuclear Regulatory Commission ("NRC") with respect to an operating nuclear plant's responsibilities to ensure the health and safety of the public. The NRC has stipulated that nuclear power plants must provide reasonable assurance that all personnel with access to vital areas at operating plants are fit for duty.

5. On August 5, 1982, the NRC published in the *Federal Register* (42 Fed. Reg. 33980) a proposed rule on fitness-for-duty. This rule would have required licensees to establish and implement written procedures for ensuring that personnel in a nuclear power plant are fit for duty.

6. In 57 *Federal Register* 27921, the NRC expressly recognized drug and alcohol abuse problems to be a social, medical and safety problem affecting every segment of our society. Given the pervasiveness of the problem, the NRC recognized that it exists to some extent in the nuclear industry. "The Commission proposed this rule because of a concern that certain persons could become unfit for duty due to the effects of substances such as alcohol or other drugs, and, thereby, adversely impact the health and safety of the public. . . . Prudence, therefore, requires that the Commission take apporpriate precautionary measures to reduce the probability that a person who is under the influence of alcohol or other drugs, or who is otherwise unfit for some task involving a nuclear power unit, may cause an accident or react inadequately to an accident."

Indeed, as indicated in Information Notice No. 82-05, issued on March 10, 1982, by the NRC's Office of Inspection and Enforcement, the number of reported drug-related

incidents involving the nuclear industry are increasing. The reported incidents implicate a range of licensee or contractor personnel, including personnel in construction, operations and security. The reported incidents are widespread geographically, and involve power reactor sites in each of the five NRC regions.

7. However, the NRC decided to defer implementation of the rule so long as initiatives taken by the nuclear industry through the activities of Nuclear Utility Management and Resources Committee (NUMARC), Edison Electric Institute (EEI), and Institute of Nuclear Power Operations (INPO) satisfied NRC concerns for safety.

The NRC will continue to independently evaluate applicant development and licensee implementation of fitness-for-duty programs and to ensure that desired results are achieved. As stated in 51 *Federal Register* 27921, "The NRC will evaluate the effectiveness of utility fitness-for-duty programs by its normal review of industry activities, through reviews of INPO program status and evaluation reports, periodic NRC observation of the conduct of INPO evaluations, and direct inspections conducted by NRC's Performance Appraisal Team, Regional Offices, and Resident Inspectors. NRC will also monitor the progress of individual licensee fitness for duty programs."

8. Aside from the guidance of the NRC, the Supply System has long recognized the need to restrict access to the vital areas of the plant to those individuals who are physically, mentally and emotionally stable. A number of our procedures, in addition to Fitness-for-Duty, are aimed at achieving this need, including background investigations, physical and psychological examinations.

9. On August 4, 1986 the Commission issued a Policy Statement on Fitness-for-Duty of Nuclear Power Plant Personnel. (51 Fed. Reg. 2791). It outlines the NRC's "expectations of licensee programs" which include the following:

"It is Commission policy that the sale, use, or possession of alcoholic beverages or illegal drugs within protected areas at nuclear plant sites is unacceptable.

It is Commission policy that persons within the protected areas at nuclear power plant sites shall not be under the influence of any substance, legal or illegal, which adversely affects their ability to perform their duties in any way related to safety.

An acceptable fitness for duty program should, at a minimum, include the following essential elements:

1. A provision that the sale, use, or possession of illegal drugs within the protected area will result in immediate revocation of access to vital areas and discharge from nuclear power plant activities. The use of alcohol or abuse of legal drugs within the protected area will result in immediate revocation of access to vital areas and possible discharge from nuclear power plant activities.

2. A provision that any other sale, possession, or use of illegal drugs will result in immediate revocation of access to vital areas mandatory rehabilitation prior to reinstatement of access, and possible discharge from nuclear power plant activities.

3. Effective monitoring and testing procedures to provide reasonable assurance that nuclear power plant personnel with access to vital areas are fit for duty."

10. The Supply System's response to the NRC's proposal has been twofold: First, the Supply System has participated on an industry-wide basis, through the EEI, INPO and NUMARC, in developing fitness-for-duty guidelines that

would cope with or prevent problems in an entire company, not just a nuclear station. Secondly, the Supply System has moved ahead with development of its own drug and alcohol abuse program. This program is designed to be preventative rather than punitive and to offer employees education, assistance and a safe working environment.

11. The program was developed in coordination with INPO and guided by the Edison Electric Institute's "EEI Guide to Effective Drug and Alcohol/Fitness For Duty Policy Development. INPO is comprised of fifty-five member utilities operating across the country.

12. The development of the Supply System's fitness-for-duty program was coordinated by the Human Resources Department. Sixteen employees representing each of the Supply System projects were asked to act on an Employee Advisory Committee to identify program concerns and to provide recommendations to Senior Management for policy purposes.

13. Local unions, including Oil Chemical and Atomic Workers and Local Union 77-IBEW were asked to designate a primary and alternate representative for committee participation.

14. The objective was to gather a group that was multidisciplinary in perspective to ensure that all the salient issues that could effect implementation of the policy were considered and addressed properly.

15. Corporate Policy and Procedure (CPP) 1.2.44 sets forth the Supply System's Fitness-for-Duty program. The following highlights some of the important features which were incorporated into the drug screening portion of that program. It is felt that these features contribute to an effective and fair application of screening devices:

Notice Given

Notice was provided to the unions and contractors about the Supply System's fitness-for-duty program. All applicants to the Supply System are informed that employment is contingent upon successful completion of screening tests and background investigations. (Sections 5.5.1, 5.2.2 and 5.5.1 of CPP 1.2.44 and Human Resources Instruction (HRI) 7.1).

Consent Form

Applicants are asked to sign a consent form which signifies their awareness of the procedures surrounding and use of screening devices employed by the Supply System. (Section 5.2.3 of CPP 1.2.44 and HRI 7.1).

Screening For Employment

The standards for pre-employment testing differ from those for screening of current employees. This is because the pre-employment drug tests are focused purely on screening and evaluating prospective employees. This testing supplements established hiring practices, including background investigations (qualifications and suitability verification), screening medical evaluations and psychological testing. The objective is to prevent unsuitable applicants from being hired and thereby obtaining access to the nuclear site.

Strict Confidentiality

Confidentiality is maintained on employee data relating to the testing process and the test results. (Section 5.1.3 of CPP 1.2.44).

Chain of Custody

Stringent procedures are maintained to ensure the integrity of samples set to labs for testing. This procedure is listed in HRI 7.3.

Medical Setting

The urinalysis exam is conducted in a hospital clinic by medical professionals. The setting and procedures are

designed to protect the dignity and privacy of the individual.

Multiple Verifications Employed

A positive result must be confirmed in four (4) separate screening tests run on the same sample. This procedure was incorporated to eliminate the chance of false positives impacting the applicant's test results. (HRI 7.2).

Appeal Process

Applicants may appeal the test results and may present evidence indicating existing medical reasons causing a positive result. (Section 5.5.3 of CPP 1.2.44 and CPP 1.2.72).

Re-application Possible

Applicants who fail the drug screening may re-apply for employment after a reasonable time. (Secton 5.2.5 of CPP 1.2.44).

Program Audits

Periodic audits are conducted to assure the continued effectiveness of the screening program.

Education and Training

Educational pamphlets and/or brochures related to health and safety information are distributed periodically to all Supply System employees.

Managers and supervisors all receive fitness-for-duty training aimed at substance abuse education and including training in behavioral observation. Behavioral Observation Guidelines are stated in Corporate Policy and Procedure 1.2.98, Rev. 2, 8-1-84.

Counseling

Substance abuse counseling is available through the Supply System's Employee Assistance Program (EAP). All employees were advised of this possibility by means of an educational brochure distributed on February 1, 1985 over one year prior to the implementation of the

Fitness-for-Duty program. Posters and pamphlets are distributed to employees periodically and provide on-going awareness of the EAP.

DATED this 11th day of December, 1986.

/s/
JANET M. HARDING, AFFIANT

SUBSCRIBED AND SWORN to before me this _____ day of December, 1986.

/s/
Notary Public in and for the State of Washington, residing at _____

[Exhibits to Affidavit are not reproduced.]

No. 88-645

(2)

Supreme Court, U.S.
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JOSEPH F. SPANIOL
CLERK

In The

Supreme Court of the United States

October Term, 1988

RON ALVERADO, GORDON C. ARLT, DAVID T. BUSHEY, EDWARD K. BURSLETT, LYNN HAMMIT, DONALD JARRET, IRA C. MARTIN, WILL MATHEWS, MICHAEL B. PARR, ART SCHMIDT AND DAVID E. YORK,

Petitioners,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM AND BECHTEL CONSTRUCTION, INC., AND/OR BECHTEL POWER CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

I. Whether the Washington Supreme Court correctly held that a state court may not apply state law to invalidate a safety regulation promulgated by a federally licensed nuclear power plant operator?

II. Whether the Washington Supreme Court correctly held that the fourth amendment is not violated by preemployment urinalysis screening of applicants for jobs with unrestricted access to a nuclear reactor facility?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

The names of the parties to this proceeding are those contained in the caption of this case. Respondents Bechtel Power Corporation and Bechtel Construction, Inc. are wholly owned subsidiaries of Bechtel Group, Inc.

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No. 88-645

In The

Supreme Court of the United States

October Term, 1988

RON ALVERADO, GORDON C. ARLT, DAVID T. BUSHEY, EDWARD K. BURSLETT, LYNN HAMMIT, DONALD JARRET, IRA C. MARTIN, WILL MATHEWS, MICHAEL B. PARR, ART SCHMIDT AND DAVID E. YORK,

Petitioners,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM AND BECHTEL CONSTRUCTION, INC., AND/OR BECHTEL POWER CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Respondents Washington Public Power Supply System and Bechtel Construction, Inc., by and through their counsel of record, respectfully present this Brief in Opposition to the Petition for a Writ of Certiorari to the Supreme Court of the State of Washington.

I.

STATEMENT OF FACTS

Petitioners are applicants and potential applicants for employment with respondent Bechtel Construction, Inc. ("Bechtel"), a construction and maintenance contractor at respondent Washington Public Power Supply System's ("Supply System") Washington Nuclear Project ("WNP-2").[1] The Supply System, a joint operating agency and municipal corporation, operates the WNP-2 nuclear reactor under an operating license granted by the Nuclear Regulatory Commission ("NRC").

Petitioners filed suit in the Superior Court for Benton County, Washington, seeking to permanently enjoin the Supply System's Fitness for Duty ("FFD") Program. Part of the FFD Program mandates preemployment urinalysis screening of two critical classes of WNP-2 job applicants: (1) applicants for long-term employment (longer than thirty days); and (2) applicants for positions with unrestricted access to the nuclear reactor. Petitioners contended that the preemployment urinalysis violated their right to privacy under article I, section 7 of the Washington State Constitution.

The Supply System developed the FFD Program in response to an NRC policy statement entitled "Statement

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[1] Petitioners are all members of Plumbers and Steamfitters Local 598. Bechtel hires members of this union to perform maintenance and modifications of critical components of WNP-2, including the Reactor Cooling System, Emergency Core Cooling System, Reactor Pressure Vessel Piping and the Radiation Waste System.

on Fitness for Duty of Nuclear Power Plant Personnel." *See* 51 Fed. Reg. 27,921 (1986) (the "1986 Policy Statement"). In this policy statement, the NRC imposed three requirements on nuclear power plant operators: (1) a requirement that the operators prohibit the sale, use and possession of drugs and alcohol within nuclear power plant protected areas; (2) a requirement that all persons granted unrestricted access to the nuclear power plant be "fit for duty" -- free from the influence of drugs and alcohol; and (3) a requirement that nuclear power plant operators establish "[e]ffective monitoring and testing procedures to provide reasonable assurance that nuclear power plant personnel with access to vital areas are fit for duty." *Id.* at 27,922.

The Supply System designed the FFD Program in consultation with industry representatives, employees, and experts in pharmacology and security. The Program includes specific procedural safeguards to ensure the accuracy of the tests and to protect the workers' privacy. The goal of the Program is to ensure that workers granted access to the reactor will perform their jobs safely and effectively. The Supply System denies applicants access to the nuclear reactor if they test positive for substance abuse; there are no other punitive measures in the policy. An applicant who fails the urinalysis may not be employed at the WNP-2 site for at least ninety days, and upon reapplication must establish his or her fitness for duty.

The Supply System, like all nuclear power plant operators, historically has conducted intensive background screening of all job applicants. These screening

procedures are designed to improve the safety and security of the nuclear facility. In addition to urinalysis, all applicants at WNP-2 undergo intensive background investigations to prevent the hiring of workers with psychological dysfunctions, financial problems or criminal records. Petitioners have not challenged these other employee screening devices.

The urinalysis screening is a simple and discreet procedure. Samples are collected in a medical facility by medical personnel. The samples are then sent to two different laboratories, where they are analyzed under two different methodologies. Each sample is tested in four separate tests, *all* of which must indicate the presence of prohibited substances before an applicant will be denied access to the nuclear facility.

The Supply System carefully conceived and narrowly tailored the FFD Program to limit the intrusion on applicants' privacy. The Program contains detailed procedural protections. The Program addresses the compelling governmental interest of nuclear safety. Given these facts, the trial court held that the FFD Program did not violate the petitioners' right to privacy under article 1, section 7 of the Washington Constitution.

The Washington State Supreme Court modified the trial court's decision by finding that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* (1982), preempted petitioners' state law challenge to a safety regulation promulgated by a federally licensed nuclear power plant operator. Accordingly, the court analyzed the FFD testing

under the fourth amendment of the United States Constitution.

Applying the administrative search exception to the fourth amendment warrant requirement, the Washington court found that preemployment urinalysis screening was constitutional in the context of the highly dangerous and heavily regulated nuclear power industry. *Alverado v. WPPSS*, 111 Wn.2d 424, 759 P.2d 427 (1988). The court unanimously held:

> [T]he "substantial government interest" at stake in this program is to ensure that personnel in vital areas of a nuclear power facility are fit for duty in one of the most sensitive and demanding industries in our economy; the public safety concerns are overwhelming. . . .
>
> [T]he warrantless inspections are necessary in this instance to further these public safety interests. Responsibilities of employees in vital areas of a nuclear power facility are of such a nature that any drug related impairment could have very serious consequences for the general public. Because of the government's overriding interest in preventing any drug-impaired employee from working in one of these vital areas, and the difficulty in determining by mere visual observation whether a prospective employee suffers from such impairment, routine drug testing in the context of preemployment screening is virtually the only way in which the operators of the WPPSS facility can effectively monitor compliance.

Alverado, 111 Wn.2d at 440.

II.

REASONS WHY THE PETITION SHOULD BE DENIED

A. THE WASHINGTON COURT CORRECTLY HELD THAT FEDERAL LAW PREEMPTS PETITIONERS' STATE LAW CLAIM

1. Federal Law Controls Challenges to the Validity of Safety Regulations Promulgated by Nuclear Power Plant Operators

The Washington Supreme Court held that federal law controls direct challenges to the validity of nuclear safety regulations. *Alverado v. WPPSS*, 111 Wn.2d 424, 431, 759 P.2d 427 (1988) (citing *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983)). Since the FFD Program clearly promotes safety at the nuclear reactor, petitioners' state law challenge was preempted by federal law.

The Washington Supreme Court and the trial court both found the NRC policy statement (and the FFD Program itself) to be directly related to nuclear safety. Also, both courts found that the Supply System and Bechtel could comply with NRC policy only by conducting pre-employment drug tests on all applicants for jobs with unrestricted access to the nuclear reactor. Accordingly, the issue presented by the petition is whether state law may interfere with a nuclear power plant safety regulation promulgated by the plant operator in accordance with NRC policy.

Petitioners cite cases in which this Court held that states are not prohibited from regulating certain aspects

of nuclear power generation.[2] All of these cases are distinguishable. First, petitioners are attempting to invalidate a nuclear safety regulation on state law grounds. None of the cited cases analyzed a direct challenge to a safety regulation, but instead discussed whether state law was preempted because of its *potential* or *indirect* effects on safety at nuclear power facilities.[3] Second, petitioners' attempt to apply state law to the Supply System's FFD Program could arguably increase the risk of an accident at WNP-2. In contrast, the cases cited by petitioners all involved state laws that indirectly imposed *more stringent* safety requirements on nuclear facilities.

Petitioners contend that state courts may apply state law to invalidate safety procedures adopted by a federally licensed nuclear power plant operator as long as the

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[2] Petitioners rely on *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); and *Goodyear Atomic Corp. v. Miller*, 108 S. Ct. 1704 (1988).

[3] In *Pacific Gas*, the state statute at issue required the state energy commissioner to establish a means for disposing of nuclear waste before certifying the construction of new plants. In *Silkwood*, the Court analyzed an Oklahoma statute that authorized punitive damages for injuries caused by the escape of plutonium from a nuclear facility. *Goodyear* analyzed the application of the Ohio workers' compensation statute to employees at a nuclear facility. *Goodyear* did not involve the Atomic Energy Act, nor did it apply the preemption analysis utilized in *Silkwood* and *Pacific Gas*. None of these cases considered a direct challenge to a nuclear safety regulation.

state law was not enacted for the purpose of regulating nuclear safety. Taken to its logical conclusion, petitioners' argument would permit states to pass, for example, laws encouraging the development of cheap electrical power and on that basis invalidate safety regulations promulgated by nuclear power plant operators. The only limit on the state's authority would be the presence of a specific statute or NRC regulation setting forth detailed safety procedures. Under petitioners' view, state courts are free to second-guess the expertise of nuclear power plant operators and invalidate the operators' attempts to implement NRC policies as long as there are no detailed NRC regulations in place. This is plainly contrary to the policy set forth in the Atomic Energy Act and described by this Court in *Pacific Gas*.

2. Petitioners' Challenge to Preemployment Screening Presents a Potential Direct Conflict Between State Law and an NRC Safety Mandate

Even if Congress has not entirely displaced state law in a given field, state law is still preempted if an "actual conflict" exists between state and federal law. Such conflict occurs when

> it is impossible to comply with both state and federal law . . . or state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (citations omitted).

The trial court found as a matter of fact that preemployment urinalysis of job applicants is the only means by which Bechtel and the Supply System can

comply with the NRC policy statement requiring a drug-free work force at nuclear reactors. *Cf. Rushton v. Nebraska Public Power District*, 844 F.2d 562, 566 (8th Cir. 1988) (finding that a similar FFD Program "is the least restrictive method of assuring the safe operation of the [nuclear] power plant.") This finding of fact highlights the potential conflict between the NRC's 1986 Policy Statement and state law. If the state court were to invalidate the FFD plan on state law grounds, Washington law would directly interfere with the federal goal of nuclear safety.

3. Proposed NRC Rules Mandating Preemployment Urinalysis Minimize the Importance of Petitioners' Preemption Argument

Shortly after the Washington Supreme Court ruled in this case, the NRC published proposed rules mandating random drug testing of nuclear power plant job applicants and employees. *See* 53 Fed. Reg. 37,695 (1988) (to be codified at 10 C.F.R. pt. 26) (proposed September 22, 1988). When the NRC finalizes this proposed rule, there will be detailed federal regulations in place and an even clearer potential conflict between state and federal law. The preemption questions raised by petitioners will not recur. Accordingly, the petition does not present an issue of significant importance to this Court and should be denied.

B. THE WASHINGTON COURT CORRECTLY HELD THAT PREEMPLOYMENT URINALYSIS SCREENING OF APPLICANTS FOR JOBS AT THE NUCLEAR REACTOR DOES NOT VIOLATE THE FOURTH AMENDMENT

The Washington Supreme Court's Decision Is Consistent With All of the Circuit Cases That Have Analyzed Drug Testing In the Employment Context

Petitioners' erroneous contention that this Court should grant review springs from their failure to acknowledge the unique facts presented by this case. The Supply System instituted the FFD Program in the context of the heavily regulated nuclear power industry. Moreover, the FFD testing serves a compelling state interest -- assuring nuclear safety. By failing to take these special considerations into account, petitioners have attempted to create a conflict between the Washington court's decision and decisions of other courts that have analyzed the constitutionality of drug testing. No such conflict exists. All of the cases cited by petitioners either explicitly or implicitly support the result reached by the Washington Supreme Court.

The Washington court's decision is consistent with the only other case directly on point. *See Rushton v. Nebraska Public Power District*, 844 F.2d 562 (8th Cir. 1988) (upholding random drug testing of nuclear power plant

employees). The decision is also consistent with decisions in the Third Circuit[4] and the Fifth Circuit.[5]

Contrary to petitioners' contention, the Washington court's decision does not conflict with the Ninth Circuit's opinion in *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988). In *Burnley*, the court declined to apply the administrative search exception to warrantless drug testing of railroad employees because they were not a "principal regulatory concern" in the railroad industry. *Id.* at 585 (distinguishing *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986)).

In contrast to workers in the railroad industry, employees in the nuclear power industry are quite clearly a matter of "principal regulatory concern." The Washington Supreme Court highlighted this factual distinction:

> Like the jockeys [in *Shoemaker*] but unlike the railroad employees [in *Burnley*], the workers at WNP 2 are subject to intensive background investigations which include credit checks, criminal records, medical and psychological evaluations; like the horseracing industry but unlike the railway industry, the regulatory agency with oversight of the nuclear power

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[4] *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) *cert. denied*, 479 U.S. 986 (1986) (random drug testing of jockeys allowed in context of highly regulated horse racing industry); *Policemen's Benevolent Association v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988) (drug testing permitted in the context of highly regulated police profession).

[5] *See Treasury Employees v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988) (permitting drug testing of applicants for sensitive positions in the Customs Service).

> industry has the authority to establish the qualifications for employees; like the jockeys but unlike railroad employees, workers in the nuclear power industry are a "principal regulatory concern."

Alverado, 111 Wn.2d at 439.

As the Washington court recognized, the *Burnley* decision did not preclude the use of drug testing in special contexts. The nuclear power industry is one such special context. The nature of the industry presents unique facts that render the FFD Program constitutional.

Other courts have recognized the special nature of the nuclear power industry despite overturning drug testing in less compelling circumstances. *See, e.g., Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988) (enjoining random drug tests of city firefighters). In *Lovvorn*, the court recognized the state interest in nuclear safety:

> [I]t would appear that the likelihood of enormous losses being imposed on society because of an impaired firefighter is significantly lower than with impaired air traffic controllers and nuclear plant employees who literally hold thousands of lives in their hands every day.
>
> . . . .
>
> In *Rushton v. Neb. Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988), the court there also recognized, in upholding the mandatory testing of nuclear plant employees, that in certain circumstances the state's interest may be so great that individualized suspicion will not be required.
>
> In the case of the mandatory drug testing program at issue here, we believe that, while firefighters may at times be in the position where significant losses could be imposed on society because of drug

> impairment, it is clearly not of the same magnitude as exists with air traffic controllers or nuclear power plant operators, for example.

Id. at 1547.[6]

The Washington court's decision is consistent with all of the circuit opinions that have analyzed drug testing of employees. The Washington court properly recognized the unique context in which petitioners will work and in which the drug testing takes place. These special facts include the necessarily intrusive background checks, psychological screenings, and criminal investigations to which applicants for jobs at the Supply System are subject, the intensive regulation of the industry (particularly its safety aspects), and the compelling state interest in nuclear safety. The Washington court's ultimate conclusion is correct under any analysis. Accordingly, there is no basis for granting the petition.

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[6] Commentators have also recognized the special nature of drug testing in the nuclear power industry. *See, e.g.*, Note, *A Proposal for Mandatory Drug Testing of Federal Civilian Employees*, 62 N.Y.U.L. Rev. 322, 365-70 (1987) (proposing that random testing be limited to employees with "ultra-sensitive positions," such as employees of nuclear power plants).

III.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request this Court to deny the Petition for a Writ of Certiorari to the Washington State Supreme Court.

DATED this 11th day of November, 1988.

RESPECTFULLY SUBMITTED,

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SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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6pp

This supplemental brief is filed to bring to the attention of the Court the decision of the Eighth Circuit in Daniel Construction Co. v. Local 257, International Brotherhood of Electrical Workers, 856 F. 2d 1174, (8th Cir. 1988), which was published after the Petitioners' petition for writ of certiorari was printed and is in conflict with the decision of the Washington Supreme Court in this case. In Daniel Construction Co., the employer sought to vacate an arbitration award. The arbitrator ruled that the employer did not have good reason to discharge construction workers employed at a nuclear power plant. The employer discharged the employees when they failed to pass a psychological screening test administered as a part of the security program for the nuclear

power plant. The arbitrator ruled the psychological screening test was not a valid screen, and therefore, an employee's failure of the test was not "good reason" for discharge. Daniel Construction, 856 F.2d at 1179. Although the Nuclear Regulatory Commission requires a security plan for all nuclear power plants as a condition of licensing, including some type of screening of individuals provided with access to sensitive areas, the NRC had not approved the specific psychological screening test used by the employer. Daniel Construction, 856 F.2d at 1176-1178.

The Eighth Circuit rejected the employer's argument that "the NRC has exclusive control over the regulation of safety at nuclear power plants, and that the arbitrator's decision regarding

Union Electric's site security plan usurped the NRC's authority." Daniel Construction, 856 F.2d at 1179. The court affirmed the arbitrator's authority to adjudicate disputes that involved safety issues under the collective bargaining agreement. It held that the arbitrator's assertion of such authority was not contrary to public policy. Daniel Construction, 856 F.2d at 1180-82.

The result in Daniels Construction is directly contrary to the decision of the Washington Supreme Court in this case. As in Daniels Construction, the NRC did not require the employer to implement the testing program which it instituted. 47 Fed. Reg. 33, 980; 51 Fed. Reg. 27, 872; Pet. for Cert., Appendix D, pp. 4-5. Nonetheless, the Washington Supreme Court held that only

federal law must be considered in determining if a drug testing program is permissible on a nuclear reservation. The Washington court held state constitutional protections for privacy are preempted, as they relate to matters affecting safety in nuclear power plants. Alverado v. Washington Public Power Supply System, 111 Wn. 2d 424, 431-33 (Wash. 1988), Pet. for Cert., Appendix B, pp. 7-10. In addition to establishing a conflict between the Eighth Circuit and the Washington Supreme Court, Daniels Construction is an example of one of the many ways the scope of the preemptive effect of the Atomic Energy Act will affect employees working on nuclear power plants. Review of this issue should be accepted.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 29th day of December, 1988.

Respectfully submitted,

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